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No. 88-.....

Supreme Court, U.S.

FILED

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

RODOLFO T. ARAMBULO,
A Witness Before the Grand Jury,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Law Offices of STEPHEN D. MILLER, INC.

STEPHEN D. MILLER*

GEORGE L. O'CONNELL

JAN B. NORMAN

612 South Flower Street

Fifth Floor

Los Angeles, California 90017

(213) 627-1900

Attorneys for Petitioner

Rodolfo T. Arambulo

* Counsel of Record

Bowne of Los Angeles, Inc. Law Printers. (213) 742-6500.

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the denial of a public hearing on a civil contempt proceeding deprives the contemnor of his constitutional rights to due process and equal protection and conflicts with applicable decisions of this Court and other circuits.

2) Whether the imposition of a substantial fine for civil contempt without evidence of contemnor's ability to pay conflicts with applicable decisions of this Court.

PARTIES BELOW

The parties below are Rodolfo T. Arambulo, a witness before the grand jury, and the United States of America.

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OCTOBER TERM 1987

RODOLFO T. ARAMBULO,
A Witness Before the Grand Jury,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner Grand Jury Witness Rodolfo T. Arambulo respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on December 16, 1987 in this case.

OPINIONS BELOW

The transcript of the proceeding in the District Court for the Southern District of New York, which was affirmed by the Second Circuit, is set forth in its entirety in Appendix A filed separately under seal at A1. The opinion of the Court of Appeals, which has not yet been reported, is set forth in its entirety in Appendix C hereto at C1.

GROUND FOR JURISDICTION

The judgment of the Second Circuit was entered on December 16, 1987. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .

STATUTE INVOLVED

This case involves 28 U.S.C. § 1826(a), the complete text of which is set forth in Appendix D hereto at D1.

I

STATEMENT OF THE CASE

Petitioner Rodolfo T. Arambulo ("Arambulo") is a citizen of the Republic of the Philippines who has been periodically present in the United States as a nonresident alien. On March 25, 1987, a grand jury subpoena duces tecum was served on Arambulo's counsel requiring Arambulo's appearance on April 14, 1987 before a federal grand jury sitting in the Southern District of New York.

A series of discussions ensued between the government and Arambulo's attorney concerning, among other matters, Arambulo's likely invocation of his Fifth Amendment privilege in response to any grand jury questioning. After a delay of several months during which the government made no attempt to reschedule Arambulo's grand jury appearance, the prosecutor demanded through Arambulo's counsel that Arambulo appear before the

grand jury in New York on September 3, 1987. At that time, as the government was aware, Arambulo maintained that the subpoena was no longer valid because of the lengthy delay. Furthermore, Arambulo was no longer in the United States.

Arambulo did not appear before the grand jury on September 3, 1987. The government obtained an order directing Arambulo to appear before the grand jury on September 8, 1987. Following Arambulo's failure to appear on that date, the district court issued an Order To Show Cause Re Contempt. On September 23, 1987, the district court held a closed hearing to determine whether Arambulo was in contempt of court pursuant to 28 U.S.C. § 1826(a) for his failure to appear before the grand jury on September 8, 1987. Arambulo was absent, but was represented by counsel at this hearing.

After disclosing that Arambulo had been subpoenaed to appear before the grand jury, the government moved to close the hearing to the public and seal the transcript of the proceedings, claiming that the hearing was ancillary to a pending grand jury matter. Counsel for Arambulo objected to the closure of the hearing.

The district court overruled this objection and summarily granted the government's motion without attempting to limit the closed portion of the hearing to discussions related to grand jury matters. Indeed, the district court made no finding that specific grand jury matters would be disclosed in a public hearing. Moreover, the district court refused to grant a public hearing even though the judge indicated that he believed the prosecutor was seeking to imprison Arambulo for his failure to appear before the grand jury.

Following the closure of the hearing, the government presented the court with a sealed *ex parte* affidavit. The judge and prosecution adjourned to the robing room to discuss the affidavit *in camera*. Upon returning to the courtroom, the district court judge ruled that the sealed affidavit need not be disclosed to Arambulo's counsel. Other than the fact that Arambulo had been subpoenaed by the grand jury, no other information that related to grand jury matters was disclosed during the contempt hearing.

At the conclusion of the hearing, the district court adjudged Arambulo in contempt for failing to appear before the grand jury. The district court ordered Arambulo to pay a \$50,000 fine for failing to appear before the grand jury on September 8, 1987 and an additional fine of \$5,000 per day for each subsequent day he failed to appear.¹ The record clearly indicates that the district court made no independent assessment whether this fine was an appropriate measure to compel Arambulo's appearance before the grand jury. Appendix A at A29-A32. (Appendix A to this Petition is being filed separately under seal because the government in the district court action and in the Second Circuit filed this document under seal.) Nor did the district court have evidence of Arambulo's ability to pay this or any other fine despite the prosecution's acknowledgment that it had access to information concerning Arambulo's bank accounts and assets. Appendix A at A30-A31.

¹Following an emergency appeal to the Second Circuit, the district court amended its order. Under the amended order, the \$50,000 fine was to be imposed if Arambulo did not appear before the grand jury on October 6, 1987 with an additional fine of \$5,000 for each day after October 6, 1987 on which Arambulo did not appear.

Arambulo filed a timely Notice of Appeal and obtained an emergency stay of the district court's order pending an appeal to the Second Circuit. On appeal, the Second Circuit affirmed the district court's ruling. On the issue of the closed hearing, the court held that even though a civil contemnor facing imprisonment is entitled to a public hearing, "those constitutional due process protections afforded a contemnor facing prison are not perceived to be necessary to the same degree to a civil contemnor not facing that prospect." Appendix C at C8. The Second Circuit also rejected Arambulo's argument that the fines were improperly imposed in the absence of any evidence of Arambulo's financial status or an independent evaluation by the district court that such heavy fines were needed to compel Arambulo's appearance before the grand jury.

To date, the fines imposed on Arambulo are staggering. As of February 5, 1988, the total fine is in excess of \$650,000 and is accruing at a rate of an additional \$150,000 per month.

II

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS RULING THAT A CONTEMNOR MAY BE DENIED A PUBLIC HEARING.

Petitioner has asserted at all stages of these proceedings that the due process clause of the Fifth Amendment entitles him to a public contempt hearing whether the sanction ultimately imposed is imprisonment or a fine. In its opinion, the Second Circuit did not challenge the

principle that the defendant in a civil contempt proceeding is entitled to a public hearing before he may be imprisoned. See *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982); *In re Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983); *In re Grand Jury Investigation*, 424 F. Supp. 802, 804 (E.D. Pa. 1976). But the Second Circuit in this case ruled that an alleged contemnor enjoys fewer due process rights, and is not entitled to a public hearing, when the district court ultimately imposes on him a substantial coercive fine rather than imprisonment. See Appendix C at C8.

This ruling creates an unwarranted distinction between contempt hearings that result in imprisonment and those that result in crippling monetary fines. This distinction is improper because it focuses on the type of punishment imposed rather than on the substantial interests that are decided in every civil contempt hearing.

The Second Circuit decision also disregards the long-recognized and fundamental principle that fair play requires an open hearing whenever substantial rights are to be decided. Finally, the Second Circuit holding violates Petitioner's equal protection right under the Fifth Amendment because no rational basis exists for denying a public hearing when the district court imposes crippling monetary sanctions on an alleged contemnor while requiring a public hearing before an alleged contemnor may be incarcerated even for a single day.

In these regards, the Second Circuit's decision in this case conflicts with applicable decisions of this Court, other circuits, and its own previous decisions.

1. The Second Circuit's Decision Denies Petitioner's Due Process Rights.

The fundamental due process guarantee of fairness in judicial proceedings demands a public hearing where deprivations of liberty or property are at issue. *See Morgan v. United States*, 304 U.S. 1, 14-15, 58 S. Ct. 773, 775 (1937); *Fitzgerald v. Hampton*, 467 F.2d 755, 764-765 (D.C. Cir. 1972). This Court has recognized in cases involving both the First and Sixth Amendments that public hearings serve fundamental public policy interests. A public hearing "enhances the quality and safeguards the integrity of the fact finding process," "fosters an appearance of fairness," and serves "as a check upon the judicial process." *Globe Newspaper Co. v. Superior Court for County of Norfolk*, 457 U.S. 596, 606, 102 S. Ct. 2613, 2619-2620 (1982). A public hearing also serves to ensure that the government and the court carry out their duties responsibly. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984). These important policy concerns are equally applicable to civil contempt proceedings whether alleged contemnors are deprived of property and financially ruined or are imprisoned.

This Court has ruled that civil contemnors are entitled to "the usual due process requirements." *Shillitani v. United States*, 384 U.S. 364, 371, 86 S. Ct. 1531, 1536 (1966). Although this Court has yet to define explicitly these due process rights, three circuits have already recognized that civil contemnors are entitled to the same procedural rights of adequate notice and a meaningful opportunity to be heard as criminal contemnors. *See In re Sadin*, 509 F.2d 1252, 1255 (2d Cir. 1975); *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973); *In re Grand Jury Investigation*, 545 F.2d 385, 388 (3d Cir. 1976). None of these circuit decisions make a civil contemnor's due

process rights contingent upon the type of sanction imposed following a finding of contempt.

Moreover, a civil contemnor's right to a public hearing has also been recognized. See *In re Rosahn*, *supra*, 671 F.2d at 697; *In re Kitchen*, *supra*, 706 F.2d at 1272; *In re Grand Jury Investigation*, *supra*, 424 F. Supp. at 804. The need for a public hearing is particularly clear in this case where before its finding of contempt but *after* its decision to close the hearing, the district court explicitly stated its belief that the prosecution was seeking to imprison Arambulo for his failure to appear before the grand jury. Only in the middle of the hearing and after the prosecution indicated its desire to impose a fine on Arambulo, did the district court decide to select that remedy. Appendix A at A12-A13.

The Second Circuit ruling in this case fails to recognize that due process rights do not depend on the type of sanctions to be imposed. The rationale of the Second Circuit decision in this case — that contemnors punished by a monetary fine deserve fewer due process rights than incarcerated contemnors — is untenable for a variety of reasons. First, the fine imposed on Arambulo already exceeds \$650,000 and continues to increase at a staggering pace. This enormous monetary sanction implicates property interests that are every bit as significant as the right to personal liberty.

Second, the current sanction of a monetary fine can apparently be modified without further court hearing. The Third Circuit, for example, has ruled that the sanctions for civil contempt pursuant to 28 U.S.C. § 1826 are interchangeable and may be imposed successively without further hearing. *Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 551 (3d Cir.), *cert. denied*, 425 U.S. 992, 96 S. Ct. 2203 (1976). Even the

Second Circuit has acknowledged the interchangeability of the two types of sanctions. *Matter of Dickinson*, 763 F.2d 84 (2d Cir. 1985). Hence, the Second Circuit's ruling in this case would improperly allow the district court to make a finding of contempt at a closed hearing in which a fine was imposed, and then later incarcerate the same contemnor by simply modifying the sanction.

Furthermore, the requirements of grand jury secrecy did not justify denying an open hearing in this case. The need for grand jury secrecy was not served by a closed hearing because the only grand jury matter disclosed during the hearing was Petitioner's identity. Petitioner has the right to disclose his identity and exercised that right by requesting a public hearing. See *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425, 103 S. Ct. 3133, 3138 (1983); *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987); *In re Grand Jury Investigation*, 610 F.2d 202, 217 (5th Cir. 1980); *United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S. Ct. 68 (1976).

The need for an open hearing is particularly compelling in this case where a politically unpopular individual has been subjected to crippling financial sanctions in a hearing closed to public scrutiny. Arambulo was an officer of the California Overseas Bank ("COB"). As the published Second Circuit decision has revealed, COB and certain of its officers are the targets of a grand jury investigation focusing on allegedly illegal activities of the former President of the Republic of the Philippines, Ferdinand Marcos, and his associates. The exhaustive media coverage of Marcos's alleged misconduct has tainted everyone associated with him. The need for public scrutiny at this contempt hearing is thus particularly compelling in order to ensure that Arambulo is afforded a fair hearing, even

though he is a potential witness in the investigation of someone as unpopular as Ferdinand Marcos.

2. The Second Circuit's Decision Violates Petitioner's Equal Protection Rights.

The Second Circuit's distinction in this case between an incarcerated civil contemnor and a civil contemnor on whom a monetary fine has been imposed also denies Petitioner's Fifth Amendment right to equal protection. This Court has held that the type of sanction imposed in criminal proceedings cannot justify disparate treatment of the criminally accused. *Mayer v. City of Chicago*, 404 U.S. 189, 196-197, 92 S. Ct. 410, 416 (1971) (fined indigents entitled to same due process rights as incarcerated indigents). The same principle should apply to Petitioner and invalidate the unequal treatment approved by the Second Circuit in this case.

The fundamental right to fairness requires a public hearing before a person may be deprived of liberty or property. See *Morgan v. United States*, *supra*, 304 U.S. at 14-15; *Fitzgerald v. Hampton*, *supra*, 467 F.2d at 764. When a fundamental right is involved, an equal protection claim is subject to a "strict scrutiny" standard of review. Thus, the United States must show a compelling government need to justify unequal treatment of a civil contemnor on whom a fine is imposed. See *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S. Ct. 1322, 1330 (1969). Measured by this standard, the Second Circuit ruling in this case violates Petitioner's equal protection guarantees because no compelling government need justifies the denial of a public hearing in this case.

Even measured by the lesser standard of a rational basis for the disparate treatment, the distinction drawn by the Second Circuit between contemnors who are

imprisoned and contemnors who are fined violates Petitioner's equal protection guarantees. The constitutional guarantee of equal protection requires a rational basis for any distinction between two classes of persons similarly situated and a determination that the classification serves a reasonable purpose. *See Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 86 S. Ct. 1497, 1499 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S. Ct. 283, 288 (1964).

Due process rights should be accorded to an alleged contemnor based on the substantial interests being adjudged in every civil contempt proceeding. Even the Second Circuit acknowledged in this case that "[t]he policy underlying civil contempt under the statute is the same whether confinement is ordered or fines are imposed." Appendix C at C11. In light of this reasoning, there is no rational basis for permitting ruinous monetary sanctions to be imposed in a closed hearing while requiring a public hearing before the imposition of any jail term. Accordingly, the denial of a public contempt hearing in this case violated Arambulo's equal protection rights.

B. CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS RULING THAT THE DISTRICT COURT IS NOT REQUIRED TO WEIGH THE CONTEMNOR'S FINANCIAL STATUS BEFORE SETTING A SUBSTANTIAL FINE.

This Court has consistently held that contempt sentences must reflect the "least possible power adequate to the end proposed." *United States v. Wilson*, 421 U.S. 309, 319, 95 S. Ct. 1802, 1808 (1975). To meet this requirement, three factors must be considered by a district court in imposing coercive fines in a contempt proceeding:

(1) the character and magnitude of the harm threatened by continued contumacy;

(2) the probable effectiveness of any suggested sanction in bringing about compliance; and

(3) the amount of the contemnor's financial resources and consequent seriousness of the burden to him.

United States v. United Mine Workers of America, 330 U.S. 258, 303, 67 S. Ct. 677, 701 (1947). The Second Circuit's holding that these factors may be ignored and that crippling fines may be imposed without any evidence of the need for such fines or the alleged contemnor's ability to pay conflicts with this Court's decisions.

In this case the district court did not have any evidence nor did it make an independent evaluation of Arambulo's financial ability to pay a fine. The Second Circuit approved the district court's failure to individually evaluate Arambulo's ability to pay this fine on the basis that no evidence of Petitioner's financial status was available to the district court.

However, the government has the burden to produce evidence of the contemnor's ability to pay a fine. *See, e.g., Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 670 (2d Cir.), *cert. denied*, 463 U.S. 1215, 103 S. Ct. 3555 (1983) (fine of \$50,000 per day reasonable in light of government's submission of affidavits showing purchases of \$345 million and tax loss claims of \$110 million); *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56-58 (2d Cir.), *cert. denied*, 459 U.S. 832, 103 S. Ct. 73 (1982) (fine of \$5,000 per day reasonable in light of evidence of sales volume of \$20 million per year of contemnor company). The government in this case admitted having information on Petitioner's bank accounts and assets but

chose not to present it to the district court. Appendix A at A30-A31. In the absence of this evidence, the district court's imposition of a \$50,000 penalty and a continuing \$5,000 per-day fine fails to conform with this Court's requirement that the fine be both individualized and limited in amount.

The Second Circuit also justified its ruling on the basis that Petitioner's counsel did not provide financial information about his client to the district court. Appendix C at C12-C13. Placing such a burden upon Petitioner violates both his Sixth Amendment right to counsel by requiring the disclosure of privileged attorney-client information and Petitioner's Fifth Amendment right against self-incrimination by requiring disclosure of financial information while facing - potential criminal charges. As a result, the courts below erred in ordering the imposition of crippling fines without evidence of Arambulo's ability to pay.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in this case.

DATED: February 5, 1988.

Respectfully submitted,

Law Offices of

STEPHEN D. MILLER, INC.

STEPHEN D. MILLER*

GEORGE L. O'CONNELL

JAN B. NORMAN

612 SOUTH FLOWER STREET

5TH FLOOR

LOS ANGELES, CALIFORNIA 90017

(213) 627-1900

Attorneys for Petitioner

Rodolfo T. Arambulo

*Counsel of Record

APPENDIX A FILED UNDER CLOSED SEAL



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re RODOLFO T. ARAMBULO
A Witness Before the Grand Jury

AMENDED ORDER
M11-189

RODOLFO T. ARAMBULO, having been called as a witness before a Grand Jury of the United States, to wit, the March 9, 1987 Special Grand Jury for the Southern District of New York, and having been further ordered to appear before said Grand Jury by the Honorable John M. Walker, United States District Judge for the Southern District of New York, on September 8, 1987 and the witness having failed to appear without just cause, such failure to appear having been duly brought to the attention of this Court, and this Court having adjudged ARAMBULO to be in contempt of this Court's Order, it is hereby

ORDERED, that ARAMBULO, his agents and representatives, are enjoined from transferring, by sale, deed, gift, or otherwise, any assets which are in the custody, possession or control of ARAMBULO, and it is further

ORDERED, that ARAMBULO appear before the Grand Jury on or before October 6, 1987 and it is further

ORDERED, that pursuant to Title 28, United States Code, Section 1826(a), (i) should Arambulo fail to appear before the Grand Jury on or before October 6, 1987, he be fined \$50,000; and (ii) Arambulo be fined \$5,000 each day that he fails to appear before the Grand Jury after October 6, 1987 until the term of the Grand Jury

B2

expires, or the Grand Jury determines that it no longer requires ARAMBULO's testimony.

Dated: New York, New York
October , 1987

SO ORDERED:

JUDGE WALKER

John M. Walker

United States District Judge
Southern District of New York

A TRUE COPY
RAYMOND F. BURGHARDT,
Clerk
By Arthur J. Muccin
Deputy Clerk





APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 477 — August Term 1987
(Argued October 23, 1987
Decided December 16, 1987)
Docket No. 87-6235

IN RE: GRAND JURY WITNESS

UNITED STATES OF AMERICA,
Appellee,

v.

GRAND JURY WITNESS,
Appellant.

Before: OAKES, CARDAMONE and MAHONEY,
Circuit Judges

Appeal from an amended order entered on October 1, 1987 in the United States District Court for the Southern District of New York (Walker, J.) holding Rudolfo T. Arambulo in civil contempt pursuant to 28 U.S.C. § 1826(a) for his refusal to appear pursuant to subpoena before a grand jury.

Affirmed.

STEPHEN D. MILLER, Los Angeles, California, *for Appellant.*

CHARLES G. LaBELLA, Assistant United States Attorney for the Southern District of New York; New York, New York (Rudolph W. Giuliani, United States Attorney; John F. Savarese, Assistant United States Attorney; New York, New York, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge:*

Rodolfo T. Arambulo appeals from an amended civil contempt order entered against him by the United States District Court for the Southern District of New York (Walker, J.) on October 1, 1987 upon his refusal to appear before a grand jury. Underlying this appeal is the fact that Arambulo has fled the country, but he invokes the court's processes to challenge the adjudication holding him in civil contempt. To fight and to flee at the same time is as difficult to accomplish successfully in law as in life.

BACKGROUND

The grand jury is investigating allegations that various individuals associated with Ferdinand E. Marcos, former President of the Republic of the Philippines, conducted and participated in a racketeering enterprise in violation of 18 U.S.C. § 1962, including embezzling substantial amounts of United States foreign aid to the Philippines, as well as funds of the Philippine government, in order to purchase commercial real estate in New York City. Specifically being investigated are various wire transfers of funds through the California Overseas Bank (Overseas Bank), a commercial bank based in Los Angeles, through the use of fictitious accounts. In that connection, the activities of Roberto Benedicto, Chairman of the Board of Directors, and Arambulo, a high-level officer and also a member of the Board of the Overseas Bank, in the alleged creation of fictitious accounts and transfer of funds are being looked into. Arambulo is a citizen of the Philippines, but until recently was present in the United States as a nonresident alien.

On March 25, 1987 a grand jury subpoena was issued in the Southern District of New York directed to Arambulo, then a resident of Los Angeles, and served on his counsel,

Wayne Smith, Esq. It required Arambulo to appear in New York and produce certain documents on April 14, 1987. Before the subpoena was served, Assistant United States Attorney Charles G. LaBella, who was responsible for assisting the investigation, discussed with Mr. Smith the timing of Arambulo's appearance and agreed that if Arambulo intended to assert his Fifth Amendment privilege he need not travel from California, but should indicate such intention by letter, which the AUSA agreed to present to the grand jury. During this conversation attorney Smith was also advised that his representation of Roberto Benedicto might present a conflict of interest. Smith asked for time to consider this and other matters raised in connection with Arambulo's appearance. These understandings were confirmed in a letter sent by Mr. LaBella to Mr. Smith with the March 25th subpoena. Shortly thereafter Mr. Smith advised the government that he would no longer represent Arambulo due to the conflict raised by his representation of Benedicto.

Later, Stephen D. Miller, Esq., Arambulo's present counsel, contacted Mr. LaBella by telephone and requested an adjournment without date in order for him to meet with his client to become familiar with the nature of the investigation and to explore his client's potential criminal exposure. The government agreed to the adjournment and scheduled a meeting on May 5, 1987 in New York City. At that meeting the AUSA outlined the charges upon which it believed Arambulo could provide testimony, and discussed the possibility of Arambulo becoming a government witness following a guilty plea to certain charges. Attorney Miller agreed to discuss these matters with his client.

On June 22, 1987 Mr. LaBella telephoned defense counsel and informed him that, based upon recent

developments in the investigation, the government would seek an immunity order for Arambulo. Mr. Miller responded that this decision placed his client in a very difficult position because of the individuals against whom he would be forced to testify, and he requested a meeting in New York to discuss alternatives to Arambulo's appearance before the grand jury.

At a New York City meeting on July 15, 1987, Smith proposed certain alternatives to Arambulo's appearance, including that if Arambulo provided evidence against the targets of the investigation the government would promise not to call him either as a witness before the grand jury or at any subsequent trial. After the AUSA rejected this proposal, Miller informed the government for the first time that Arambulo was no longer in the United States. On August 21, Miller advised LaBella that he believed the March 25 grand jury subpoena had been withdrawn by the government.

PROCEEDINGS BELOW

The AUSA promptly advised defense counsel that Arambulo should appear before the grand jury on September 3, 1987 and, when he failed to appear on that date, the government requested and obtained an order from Judge Walker, wired to Miller on September 4, directing Arambulo to appear on September 8, 1987. When Arambulo failed to appear on September 8, Judge Walker signed an order directing Arambulo to show cause why he should not be held in contempt.

A hearing was held on the show cause order on September 23, 1987 with Arambulo — who was, and apparently remains, outside of the United States — absent. Attorney Miller argued that because it was clear, based upon the May 5th meeting, "that Arambulo would assert his Fifth

Amendment privilege and that the government did not intend to provide him with immunity," the grand jury subpoena had been implicitly withdrawn by the government.

At the conclusion of the hearing, Judge Walker rejected this argument and found that: (1) Arambulo's former counsel Smith had been authorized to accept service and, therefore, the order directing Arambulo to appear before the grand jury had been properly served; (2) Arambulo had not been excused from his obligation to appear before the grand jury, and was still under a continuing duty to appear; and (3) Arambulo willfully failed to appear in violation of the order requiring him to do so. Based upon these findings, the district court ruled that Arambulo lacked just cause for his refusal to appear and accordingly held him in civil contempt pursuant to 28 U.S.C. § 1826(a). The district court imposed a \$50,000 fine as "an order . . . for a past transgression" and an additional \$5,000 for each day of continued absence. Arambulo and his representatives were also enjoined from disposing of any of his assets within the United States. On September 29, 1987 we stayed enforcement of the monetary provisions of the order and expedited this appeal. The parties stipulated to a partial remand of the order, and on October 1, 1987, the trial court entered an amended order. Under the amended order, coercive sanctions of \$50,000 were imposed if Arambulo failed to appear on or before October 6, 1987, and for each day thereafter that he failed to appear an additional \$5,000 fine was levied.

DISCUSSION

Three issues are raised in Arambulo's behalf. First, he contends that the procedures the district court followed

in holding him in contempt denied him a fair hearing and due process of law. Second, he claims that the contempt adjudication was a substantive error of law because the subpoena he allegedly failed to obey had been withdrawn by the government. Third, he argues that the fines levied against him were imposed arbitrarily and constitute an abuse of discretion.

A. Procedures Followed at Contempt Hearing

The statutory authority for an adjudication of civil contempt is set forth in 28 U.S.C. § 1826(a), which states

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826(a) (1982). Fed. R. Crim. P. 17(g) also makes a failure to obey a subpoena without adequate excuse a contempt of court. Upon an adjudication of civil contempt, § 1826(a) authorizes the contemnor's confine-

ment. Fines are an additional or alternative sanction that may be imposed. *See, e.g., Matter of Dickinson*, 763 F.2d 84, 88 (2d Cir. 1985); *Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 550-51 (3d Cir.) (reviewing legislative history), *cert. denied sub nom. Freedman v. United States*, 425 U.S. 992 (1976).

An adjudication of civil contempt is coercive — to compel obedience to a lawful court order — criminal contempt is imposed to punish the contemnor for an offense against the public and to vindicate the authority of the court. *United States v. Petito*, 671 F.2d 68, 72 (2d Cir.), *cert. denied*, 459 U.S. 824 (1982). Refusal to obey a court order may subject a person to both civil and criminal contempt for the same acts. *Yates v. United States*, 355 U.S. 66, 74 (1957). At issue in the instant matter is an adjudication for civil — not criminal — contempt, and the imposition of sanctions — not a summary order of confinement — for appellant's failure to obey a subpoena.

Judicial sanctions following an order of civil contempt may be employed both to compel compliance with the court's order, as here, and as a remedial measure to compensate a civil complainant. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 448-49 (1911). Where the purpose of civil contempt is compliance, the district court must consider several factors, which will be discussed shortly.

Appellant first argues that the denial of an open hearing deprived him of due process. A witness charged with civil contempt, absent the imminent threat of confinement, is not entitled to "every right available to a defendant in a criminal contempt proceeding." *In re Kitchen*, 706 F.2d 1266, 1271 (2d Cir. 1983). While we have been guided by the Ninth Circuit's lead in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), "on the procedures

to be followed before imprisoning a recalcitrant witness under § 1826(a)," *Kitchen*, 706 F.2d at 1271, we are not faced with that concern on this appeal.

Hence, all of the procedural safeguards we have previously recognized in the context of possible imprisonment, e.g., *In re Sadin*, 509 F.2d 1252, 1255 (2d Cir. 1975) (witness entitled to uninhibited adversary hearing); *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975) (right to counsel); *In re Rosahn*, 671 F.2d 690, 696-97 (2d Cir. 1982) (open public hearing required where civil contemnor faces confinement), generally are not required here. The reason is simply that those constitutional due process protections afforded a contemnor facing prison are not perceived to be necessary to the same degree to a civil contemnor not facing that prospect. See *In re Rosahn*, 671 F.2d at 697. Further, Arambulo has chosen not to appear, and has absented himself from the United States without providing, through counsel or otherwise, an explanation. We decline to extend an even greater degree of protection to a contemnor who has voluntarily chosen not to appear.

The facts here reveal that Arambulo had at all times since the issuance of the subpoena for his appearance before the grand jury been represented by competent counsel. Moreover, there is a strong likelihood that were this civil contempt proceeding conducted at a public hearing sensitive and secret grand jury investigative information would be revealed to the prejudice of the public interest. Under these circumstances, the district court's decision to close the hearing did not deprive the absent Arambulo of his right to due process of law.

Appellant next asserts that during the contempt hearing the government presented the district court with a sealed *ex parte* affidavit, and adjourned to the robing room to discuss it outside the presence of Arambulo's

counsel, without affording defense counsel an opportunity to examine the affidavit. Arambulo argues that this submission also denied him his right to a fair hearing. The government responds that the district court expressly found that the papers submitted had no direct bearing on the contempt proceeding. We have read the papers submitted regarding the on-the-record (though sealed) colloquy between Judge Walker and AUSA LaBella and are satisfied that the actions by the government did not deprive appellant of a fair hearing.

In sum, the procedures followed by the district court in adjudicating appellant in civil contempt did not deprive him either of due process of the law or of a fair hearing.

B. Withdrawal of Subpoena

The March 25, 1987 grand jury subpoena was served on Arambulo through his counsel. It contained the customary language commanding him to "testify and give evidence . . . and not to depart the Court without leave thereof, or of the United States Attorney . . . [a]nd for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to the penalties of law." Appellant urges that subsequent actions of the AUSA had the effect of impliedly withdrawing or extinguishing this subpoena. Alternatively, Arambulo contends that he fully satisfied his obligations under the subpoena when his attorney advised that if forced to appear he intended to invoke his Fifth Amendment privilege. We are not persuaded by either argument.

The district court held that once the grand jury subpoena is served it remains in effect and may not be withdrawn by implication. We agree. For over half a century it has been established law that unless a subpoena is vacated upon proper application, the person whom it

directs to appear must "respond to the subpoena and [must] remain in attendance until excused by the court or by the Government's representatives." *Blackmer v. United States*, 284 U.S. 421, 442-43 (1932) (witness failing to appear on adjourned date of subpoena held in contempt over argument that he was only obliged to appear on the date specified on the face of the subpoena).

The various telephone calls and meetings following the issuance of the subpoena did not mark its withdrawal. It remained an outstanding, viable, continuing order that Arambulo had a duty to obey. Nor did the adjournments that were sought for defense counsel's benefit or Arambulo's convenience vitiate the subpoena. In *United States v. Snyder*, 413 F.2d 288 (9th Cir.), *cert. denied*, 396 U.S. 907 (1969), the government had an arrangement under which the subpoenaed witness agreed to be "on call" to testify. This arrangement was held to have no effect on the continuing vitality of the subpoena, and could not be considered an agreement to replace it. *Id.* at 288-89. Adjournments from a grand jury appearance cannot later be viewed as an "excuse" by the government's representatives from the subpoena's commands. If this were the rule, adjournments would never be granted. Further, Arambulo, who sought these adjournments, may not now complain that the commands appearing on the face of the subpoena were not insisted upon. *United States v. Germann*, 370 F.2d 1019, 1022 (2d Cir.), *vacated because of petitioner's death*, 389 U.S. 329 (1967).

Arambulo's alternative argument requires little comment. It is sufficient merely to note that the discussion regarding Arambulo not appearing before a grand jury in New York was conditioned on his furnishing a letter stating his intention to invoke the Fifth Amendment. He never fulfilled the condition. Moreover, even if he had

written such a letter it would not alter his continuing duty to obey the March 25th subpoena, absent being excused by the district court or the AUSA. *See Blackmer*, 284 U.S. at 443; *Snyder*, 413 F.2d at 289; *Germann*, 370 F.2d at 1022. There is no evidence that such an excuse was ever given, and we do not construe these conversations, telephone calls and adjournments as an implied excuse from that obligation. Hence, appellant's arguments on the implied withdrawal of the subpoena and discharge of his obligation under it must fail.

C. Fines

Appellant objects to the monetary sanctions imposed, claiming that the district court failed to exercise its discretion properly when it imposed such substantial fines for his failure to appear. Arambulo's argument is focused principally on the \$50,000 originally imposed for his "past transgression" in failing to appear before the grand jury on September 8, 1987. Of course, this fine was punitive, as the panel that expedited this appeal pointed out, and was not properly imposed in a civil contempt proceeding. An amended order was subsequently entered by the trial court that made the \$50,000 fine conditional on appellant's failure to appear on or before October 6, 1987. Arambulo asserts that this too is an inappropriate coercive fine because, he argues, before signing the amended order the district court failed to weigh the required interests.

The policy underlying civil contempt under the statute is the same whether confinement is ordered or fines are imposed. Section 1826(a) provides that the period of confinement for civil contempt terminates when the grand jury is discharged. The contemnor must be released at that time because the possibility of his compliance has

ended. *Shillitani v. United States*, 384 U.S. 364, 371 (1966). It follows that for the same reason when the civil contempt order imposes a fine, the contemnor's financial resources must be weighed in order to decide whether the sanctions appropriately compel obedience to the order. In *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), the Supreme Court set forth what a district court must consider when imposing civil contempt sanctions for the purpose of making a contemnor comply. It should examine (1) the character and magnitude of the harm threatened by continued contempt, (2) the probable effectiveness of the proposed sanction, and (3) the financial consequence of that sanction upon the contemnor. *Id.* at 304; *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.), *cert. denied*, 459 U.S. 832 (1982).

Before holding Arambulo in civil contempt, Judge Walker heard oral argument and reviewed the submissions of the government and defense counsel. The argument and papers demonstrated the important part Arambulo would play as a witness in the grand jury's continuing investigation into the alleged embezzlement of a substantial amount of public funds. They also revealed that without appellant's testimony there is a risk that the investigation would be jeopardized.

Arambulo's counsel claims, nonetheless, that there was no concrete information before the district court concerning Arambulo's finances and the burdens such fines would have on him. Such an assertion is somewhat disingenuous. The government conceded it had little information on Arambulo's financial situation. The only evidence that appears in the record is that Arambulo was a highly placed official in the Overseas Bank and a member of its Board of Directors. More important is the fact that Arambulo's counsel was present at the hearing and could

have presented evidence regarding any unfair burden caused by the fine. Instead, defense counsel chose to remain silent. His failure to present any evidence on the record may not be charged either against the government or result in a holding that the district court abused its discretion in imposing the sanction.

Moreover, the factors noted in *United Mine Workers* are only guides to be used when and where appropriate. The imposition of coercive sanctions by way of fines is generally an area in which appellate courts must rely heavily on the informed exercise of the district court's discretion. Judge Walker's order appears reasonable under the circumstances. See *Perfect Fit Indus.*, 673 F.2d at 57; *International Business Machs. Corp. v. United States*, 493 F.2d 112, 116-17 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

CONCLUSION

Accordingly, for the reasons stated the civil contempt order appealed from is affirmed.

APPENDIX D

Title 28, United States Code, Section 1826(a) provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

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before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 5, 1988, I served the within Petition for a Writ of Certiorari in re: "Rodolfo T. Arambulo vs. United States of America" in the United States Supreme Court, October Term 1987, No. 88..... Appendix A filed under separate seal thereto;

On the parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

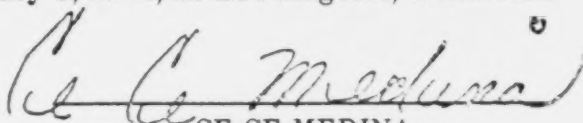
The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Washington, D.C. 20530

Charles G. La Bella, Esq.
Assistant United States Attorney
United States Attorney
South District of New York
One Saint Andrew's Plaza
New York, New York 10007

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 5, 1988, at Los Angeles, California


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